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No. _____

In The
Supreme Court of The United States
October Term 1997

SUSAN KAY HASTINGS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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13 pp

QUESTION PRESENTED FOR REVIEW

In a conviction under 18 U.S.C. §1956(a)(1)(B)(i) (and §2), can the essential elements (conducting, knowledge, design to conceal) of proof required for the financial transaction charged be satisfied, beyond a reasonable doubt, by the government's nearly total reliance on subsequent uncharged transactions, which differ from the charged transaction in timing, substance, amount, and most importantly, state of mind?

LIST OF ALL PARTIES TO THE PROCEEDING

A list of all parties to the proceeding in the court whose judgment is sought to be reviewed:

Appellee:	United States of America
Appellants:	Darrell Dean Van Brocklin
	Travis Edward Atterberry
	Lawrence Kermit Pyatt
	Susan Kay Hastings

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Susan K. Hastings, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered August 13, 1997.

CITATIONS TO LOWER COURT OPINIONS

The Eighth Circuit Court of Appeals opinion, reported at 115 F.3d 587 (8th Cir.1997), appears at Appendix 1. The Eighth Circuit Court Order Denying Petition for Rehearing appears at Appendix 31.

BASIS FOR SUPREME COURT JURISDICTION

Judgment was imposed upon Petitioner by the United States District Court May 3, 1996. The Eighth Circuit Court of Appeals issued its opinion dated June 6, 1997, affirming in part, vacating in part, and remanding in part . The Eighth Circuit Court of Appeals denied Petitioner's timely filed Petition for Rehearing By Panel August 13, 1997. This Court's jurisdiction is involved pursuant to 28 U.S.C. §1254(1)

AUTHORITIES INVOLVED

(Pertinent text set out verbatim at Appendix 32)

U.S. Const. amend. V
18 U.S.C. §1956(a)(1)(B)(i)
18 U.S.C. §2
18 U.S.C. §1957
18 U.S.C. §215
28 U.S.C. §1254(1)
18 U.S.C. §1344

STATEMENT OF THE CASE

First Federal Savings Bank ("FFSB") was a federally insured thrift institution in Rapid City, SD, regulated by the Office of Thrift Supervision ("OTS"), with William Hawthorne agent-in-charge of FFSB. In 1989 OTS required FFSB's Board of Directors to sign a Consent Agreement, which significantly restricted the operations of this capital-deficient institution, and brought in Darrell Van Brocklin as president and Board member until he resigned Apr. 9, 1992.

Susan K. Hastings, employed by FFSB since 1987, received the title "Senior Vice President" in 1990, and was elected to fill the vacancy of a retiring Board member in 1991. In charge of general administration, Hastings took the minutes for the Board and was not involved in loans or loan functions at FFSB. Hastings resigned in mid-April 1992. FFSB was closed by the OTS/Resolution Trust Corporation ("RTC") Apr. 24, 1992.

In its 1991 exam of FFSB, OTS concluded that the $50 million of California loans known as the First Western Mortgage Corporation ("FWMC") loans, had to be sold to increase liquidity and downsize the bank for sale. FFSB had been trying to sell the loans since 1989. At the Jan. 21, 1992 Board meeting, Van Brocklin reported that a party was seriously looking at buying the loans, and also, that FFSB was looking to sell its charged-off loans. An offer to purchase the FWMC loans was faxed to FFSB Jan. 21 by First National Funding, Inc., a FL corporation ("FNF/FL"), with principals Travis Atterberry and Larry Pyatt. By letter dated Jan. 28, Hawthorne approved the sale of the FWMC loans for 70 cents and the charged-off loans for 2 cents on the dollar.

In Jan. 1992, in the presence of RTC Specialist Mike Breidenbach, Van Brocklin instructed Pam Brekke, Assistant Vice President ("AVP") Loan Workouts, and Roberta Hook, AVP Loan

Servicing and Collections, to clean up FFSB's classified loans list by considering for charge-off all loans classified doubtful or loss. Brekke and Hook used their discretion to compile a list of 36 loans proposed for charge-off, to add to the existing portfolio of over 1,200 loans. That list was presented to the Board for approval Jan. 29, 1992.

On Jan. 29 the Board approved the sale of the FWMC loans and the charged-off loans. Breidenbach was present and encouraged the charged-off loans sale at 2 cents. Prior to the Board's vote, Van Brocklin disclosed he had a job offer from FNF/FL and would abstain from voting. The purchase agreement between FFSB and FNF/FL was executed Feb. 10. On Feb. 12, Van Brocklin signed an Agreement of Association with FNF/FL whereby he would perform management and consulting services and be paid a percent of net spread, with a minimum of $250,000 in 1992, with $50,000 upon signing.

On Feb. 14, 1992, Van Brocklin formed his own SD corporation, First National Funding, Inc. ("FNF/SD"). At Van Brocklin's request, Hastings filled in the blanks, in her own handwriting, on the standard state articles of incorporation form, which Van Brocklin submitted to the state. At Van Brocklin's request Carla McBride, an FFSB employee, notarized Van Brocklin's signature on the form. On Feb. 17, while in California, Van Brocklin and FNF/FL executed a Servicing Agreement whereby FNF/SD would service and collect the charged-off loans purchased by FNF/FL, with FNF/SD to receive 60% of net collections and FNF/FL 40%. Van Brocklin was the sole owner, director, and officer of FNF/SD at all times.

On Feb. 18, Van Brocklin and Brekke attended the first of three closings at First American Title in Santa Ana, CA. Prior to closing, FNF/FL's buyer, Consumer Guaranty Company ("CGC"),

decided not to purchase all the FWMC loans, so FNF/FL did not close on the entire package. Twenty-four of the 64 loans were sold, plus the charged-off loans. FFSB, FNF/FL, and CGC agreed CGC would post a $1 million bond for the right to purchase more loans by Feb. 28: Van Brocklin telephoned Hawthorne from CA to obtain approval. The bond was ultimately forfeited to FFSB. FNF/FL's profit on the first closing was $1,581,138.75, of which $230,000 was paid to FNF/SD.

Van Brocklin took with him to the Feb. 18 closing an FFSB check for $71,010.31, representing interest adjustments on FWMC loans, to be passed on to the buyer of the FWMC loans, then to the respective borrowers. At Van Brocklin's instruction, Brekke calculated the adjustments and prepared the check and cover letter Feb. 14, postdating the check to the date of its expected delivery, Feb. 18. Brekke also prepared a second letter Feb. 14, in preparation for the Feb. 18 closing, in regard to the IRS interest reporting requirement on the FWMC loans, providing to the buyer (FNF/FL) the amount of interest FFSB had received year to date 1992 on each of the 64 loans. The check and both letters were signed by Hastings as a titled signer and one of the few employees so authorized. The matter of interest errors had been found during the 1989 OTS exam and had not yet been corrected by FFSB.

On Feb. 20, Van Brocklin spoke by phone with Hawthorne about his desire to resign. Concerned about employee morale and a run on the bank, Hawthorne advised Van Brocklin to submit his resignation with a floating date to coincide with the date of FFSB's resolution, then unknown, and to document the Feb. 18 closing and his acceptance of employment with FNF/FL. Hawthorne also required the Board to adopt a resolution restricting Van Brocklin's future dealings with FNF/FL on behalf of FFSB. At the Feb. 20 Board meeting, Van Brocklin reported he had signed an

employment contract with FNF/FL, had contracted with FNF/FL to service the charged-off loans, had formed a corporation under the same name for that purpose, and would be hiring Brekke to work for him.

The second and third closings took place in California Mar. 2 and 6, 1992, on 8 more FWMC loans. FNF/FL's profit on its resale of the loans to First Fidelity was $386,059.19 and $2,112,142.90, respectively, of which $750,000 from the latter was paid to FNF/SD.

Brekke, Hastings, and CPA Dave Carlson were among the FFSB employees who performed tasks for FNF/SD at Van Brocklin's request while still employed by FFSB. Brekke worked on charged-off loan collections, prepared and sent the "hello-goodbye" letters to all charged-off loan customers, was involved with the moving company, and shopped for charged-off loans software, with guidance from Carlson. Hastings went to the Rapid City Post Office to obtain a post office box Feb. 19, went to Mr. Print to order stationery Feb. 24, and filled out some deposit slips for collection checks signed over by FFSB after the sale. Carlson shopped for computer equipment and installed it at FNF/SD's office. On Apr. 8, 1992, Hawthorne visited FFSB to investigate a possible conflict of interest reported by an FFSB employee, involving Van Brocklin, Hastings and Brekke, concluding that, although there was the appearance of a conflict, he perceived no wrongdoing or monetary loss to FFSB and believed Van Brocklin was safely and soundly operating FFSB. FNF/FL eventually sold its charged-off loans to FNF/SD Jan. 8, 1993, for $48,745.64.

In May 1992, RTC Specialist John Jones analyzed the sold and unsold portions of the FWMC loans portfolio, concluding in his written report that an unfavorable cherry pick did not occur, and that the value of the unsold loans was approximately 70 cents on the

dollar.

On August 18, 1994, Van Brocklin, Pyatt, Atterberry and Hastings were indicted. Hastings was charged with one count of bank fraud under 18 U.S.C. §1344 (Count 1), two counts of money laundering under 18 U.S.C. §1956(a)(1)(B)(i) and §2 (Counts 29 and 30), and eight counts of engaging in monetary transactions under 18 U.S.C. §1957 and §2 (Counts 21-28). On Dec. 18, 1995, the jury returned guilty verdicts on all counts except one §1957 count (Count 21) against Hastings. On May 3, 1996, Hastings was sentenced to 51 months imprisonment, 3 years supervised release, a fine of $10,000 and restitution of $250,000, to be offset against $1,325,910.60 forfeiture (Count 33). On June 6, 1997, the Court of Appeals vacated Hastings' forfeiture conviction and remanded her fine and restitution.

Prior to trial, the parties signed a facts stipulation which included, "the price of 70 cents on the dollar for the commercial real estate loans referred to as the First Western Mortgage Corporation Loans is not claimed to be below market value on that package of loans with a face value of approximately $50,000,000." Hastings filed or joined in numerous motions, including motions to compel production of records and documents, for judgment of acquittal on all counts due to failure of proof, to dismiss the money laundering counts due to failure to prove the predicate acts, for judgment of acquittal on money laundering Counts 29 and 30.

Hastings received none of the monies from any of the questioned transactions, did not attend the closings and was not involved in any negotiations. None of the witnesses from CA or the charged-off loan borrowers knew Hastings. Hastings had no contractual relationship with FNF/FL and was never an owner, officer or director of FNF/SD or FNF/FL. Hastings took a job with FNF/SD doing bookkeeping and accounting Apr. 16, 1992, after

resigning from FFSB. She was a salaried employee of FNF/SD and, on Apr. 23, 1992, was added as an authorized check signer on her employer's (FNF/SD) bank accounts.

REASON FOR PETITION

The reason this Petition for certiorari should be granted is that the affirmance of Hastings' convictions on Counts 29 and 30 demonstrates a significant departure from circuit-wide decisions and applications of the §1956 money laundering statute. The departure is with respect to the allowance of the government's nearly total reliance on eight subsequent uncharged transactions to satisfy the essential elements of the two charged transactions.

In Hastings' case, the result is essentially the defendant convicted for transactions not charged under the §1956 statute, denying her the constitutional right to Due Process under the 5th Amendment, the opportunity to prepare a defense for the crimes charged, and reducing the government's burden to prove every element of each crime charged to less than beyond a reasonable doubt. Cole v. State of Arkansas, 68 S.Ct. 514; In Re Winship, 90 S.Ct. 1068; Jackson v. Virginia, 99 S.Ct. 2781; U.S. v. Ballew, 40 F.3d 936, 941 (8th Cir.1994). This sanctions a "scattergun" approach to the charging and prosecution of transactions under the §1956 statute, setting a precedent of constitutional magnitude.

The effect to Hastings goes beyond Counts 29 and 30. That is because finding that the requisite knowledge elements in Counts 29 and 30 have been satisfied on the basis of the 8 subsequent transactions, sanctions the use of a standard of less than beyond a reasonable doubt for proving requisite knowledge, not only under §1956(a)(1)(B)(i) (and §2), but also under the predicate crime of bank fraud under §1344, and, derivatively, engaging in monetary transactions under §1957 (and §2), covering all Hastings' counts of conviction. These defects are such a departure from the

accepted and usual course of judicial proceedings, and a sanctioning of such a departure by a lower federal court, that it calls for an exercise of the Supreme Court's power of supervision. S.Ct.R.10.1(a); S.Ct.R.16.1.

ARGUMENT

Count 29 charged Hastings with the deposit of a check in the amount of $230,000 Feb. 21, 1992, and Count 30 charged her with the deposit of a check in the amount of $750,000 Mar. 7, 1992, in violation of §1956(a)(1)(B)(i) and §2.Each count requires that the government prove four essential elements beyond a reasonable doubt:

(1) Defendant conducted a financial transaction, i.e., the deposits of the checks;

(2) Defendant knew that the property, i.e., the checks, involved in each transaction, i.e., the deposits of the checks, represented the proceeds of specified unlawful activities, i.e., Receipt of Commissions or Gifts for Procuring Loans, and Bank Fraud, in violation of 18 U.S.C. §215 and §1344, respectively;

(3) The property, i.e., the $230,000 check and the $750,000 check, was in fact the proceeds of that specified unlawful activity; and

(4) Defendant knew that the transactions, i.e., the deposits of the checks, were designed, in whole or in part, to conceal and disguise the nature, location, source, ownership and control of the proceeds of the specified unlawful activities.

With regard to essential elements 1, 2 and 4, the convictions are based on Hastings' involvement in 8 subsequent transactions, all differing in time, amount, substance, and most importantly, state of mind, from the charged transactions of Counts 29 and 30. (Alternatively, if convicted under §2, Petitioner's Question turns instead to the essential elements of §2 as to the charged transactions, presented at the end of the Petition.) Essential element 2, requisite

knowledge, is necessarily addressed from the standpoint of the underlying scheme to defraud charged in Count 1 under §1344, from which Hastings' requisite knowledge in Counts 29 and 30 is derived.

AS TO ESSENTIAL ELEMENTS 1 AND 4

The government states on page 52 of its brief, "Her participation in issuing the $150,000 check in conjunction with her knowledge. . . is adequate to support participation in Count 29..." And, with regard to Count 30,

> As part of the scheme of concealment in that count [Count 30] $720,000 of those funds were almost immediately removed from the First National Funding account ... by virtue of 7 checks and a transfer. Ex. 122. All 7 of those checks were written by Susan Hastings and signed by Darrell Van Brocklin as was stipulated to by Hastings ... Again, it is reasonable to infer... that she participated in the concealment of these assets...there is therefore sufficient evidence on both of these counts to support her conviction in this case.

Thus, it is clear that the government relies on the 8 subsequent transactions ($150,000 check plus the 7 checks) to satisfy the conducting and concealment essential elements for the two charged transactions. Consistent with the evidence in the record, the government does not contend Hastings made the deposits, that is, that Hastings "conducted" the two charged transactions. The government states on page 58 of its brief, the checks "were provided to Van Brocklin who deposited them..."

However, Petitioner must point out, in stating the facts in the light most favorable to the verdicts, the Court of Appeals, on

pages 9 and 21 of its opinion, does in fact attribute the deposits to Hastings, materially misconstruing the evidence:

> The following Monday, Hastings deposited this check [$750,000] in FNF/SD's account. . . Hastings and Van Brocklin's money laundering convictions stemmed from their deposit and immediate transfer of the two checks totaling $980,000. (emphasis added)

This material misconstruction[1] of the evidence goes right to the heart of satisfying essential elements 1 (conducting) and 4 (concealment) in Counts 29 and 30, but is not supported by the evidence on record and is not contended by the government. Indeed, that is the very reason the government apparently found it necessary to rely on the 8 subsequent transactions, because there is no evidence Hastings conducted the two transactions charged. It is only reasonable to believe that this material misconstruction played a part in the Court of Appeals' affirmance of Hastings' convictions on Counts 29 and 30. However, for purposes of this Petition and Question, the misconstruction will be set aside, and the Question

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[1]Two additional points raised in the quoted portion of the opinion are significant as to that Court's misconstruction of Hastings' participation: (1) The evidence shows the $750,000 check was deposited on Sat., Mar. 7, the same day Van Brocklin received the check, not Mon.; the Mon. Mar. 9 posting date to the account reflects usual bank practice to post Sat. transactions with Mon.'s date. Exh. 117. The significance to Hastings is that this leads to the most likely inference that Van Brocklin received and deposited the check the same day, not that Hastings deposited it "the following Monday". (2) The evidence shows, and the government contends, that Hastings was involved in the transfer, not of $980,000, but of $870,000. Exh. 122.

and Argument will be addressed based on the government's argument and based on the evidence in the record.

Count 29

With respect to Count 29, Hastings stipulated to having filled out, in her own handwriting, a check for $150,000 on Van Brocklin's FNF/SD account Feb. 21, 1992. Van Brocklin signed the check, transferring funds from his business account to his personal account. Hastings had no ownership, access, control or signatory authority over Van Brocklin's business or personal accounts. Trial Transcript ("TX") v.10, 1703; v.11, 1903; v.15, 2687-729; Trial Exhibit ("Exh.") 58, 80, 502.4, 502.5. There is no evidence Hastings saw the $230,000 check or that she knew at the time she filled in the $150,000 check that Van Brocklin had made a deposit of $230,000 to his business account. Brekke testified the handwriting on the $230,000 deposit slip was not Hastings'. TX v.17, 2832-35.

The $230,000 deposit and the $150,000 check are separate and distinct transactions in time, substance and amount. Most importantly, they involve different states of mind. The most Hastings' involvement with the $150,000 check proves is that Hastings was aware on Feb. 21 that Van Brocklin possessed $150,000. There is no evidence that she knew when or how Van Brocklin came to possess the $150,000, when Van Brocklin opened the bank account, or that she knew of Van Brocklin's personal financial position. Hawthorne testified Van Brocklin drew a substantial compensation package at FFSB, the first year's salary $130,000 plus signing bonus $32,500, auto allowance $7,000 and moving expenses $10,000. This infers Van Brocklin received substantial compensation packages even prior to FFSB.

Furthermore, the concealment element of the $230,000 deposit was allegedly accomplished by the $230,000 check being

payable to "First National Funding", to conceal it was being paid to Van Brocklin. Yet the record contains no evidence Hastings saw the $230,000 check to know who the payee was. The record also contains no evidence Hastings saw any other documents, e.g., the buyer's closing statement, to know that a $230,000 check was disbursed at closing. To the contrary, Rosie Frank of First American Title testified that a party's closing statement is private as to that party, i.e., the buyer's (FNF/FL) closing statement would not have been made available to the seller (FFSB). TX v.5, 843. Hence, the record is simply devoid of evidence that infers Hastings had any knowledge of the "design to conceal" essential element of Count 29. A $150,000 transfer from Van Brocklin's business account to his personal account is hardly suggestive of concealment. Yet it is with respect to this transaction that the gavernment relies for satisfying the essential elements of conducting and knowledge of concealment for the transaction charged in Count 29.

Count 30

With regard to Count 30, Hastings stipulated to having filled out, in her own handwriting, 7 checks totaling $720,000 dated Mar. 9-16, 1992, on Van Brocklin's FNF/SD account, over which she had no ownership, access, control or signatory authority. Van Brocklin signed the checks, transferring funds from his business account to various personal accounts. To Hastings, involved only in the subsequent transfers, this would hardly suggest a design to conceal. The 7 checks are separate and distinct transactions in time, substance, and amount, involving a different state of mind, than the $750,000 deposit. As with the $230,000 deposit, the concealment allegedly took place by the $750,000 check being payable to "First National Funding" to conceal it was paid to Van Brocklin. Brekke testified the handwriting on the $750,000 deposit slip was not Hastings'. TX v.17, 2832-35.

The most that Hastings' involvement with the 7 checks totaling $720,000 proves is that she was aware on Mar. 9 that Van Brocklin possessed $680,000 and on Mar. 16 that Van Brocklin possessed $40,000. There is no evidence Hastings knew when or how Van Brocklin came to possess the monies. Any assertion that she knew, at the time she filled in the 7 checks, that Van Brocklin had received any amount of monies from the Mar. 6 closing is mere speculation. (The government does make that assertion, however, based on Brekke's testimony that Hastings was at FFSB the day Brekke delivered the envelope containing the check to Van Brocklin. This is discussed in the next section of this Petition under essential element 2, knowledge.)

The requirement that the government be specific as to what financial transaction is charged against a defendant is demonstrated in U.S. v. Johnson, 971 F.2d 562 (10th Cir.1992), where defendant was charged with 62 counts of money laundering and engaging in monetary transactions under 18 U.S.C. §§1956 and 1957. Convictions for 28 of the transactions were reversed because the government did not meet its burden of proving each essential element for each transaction charged. Proof of elements from other transactions, charged or uncharged, was not permitted to be imputed or substituted to charged transactions, as in Hastings' case.

U.S. v. Garcia-Emanuel, 14 F.3d 1469 (10th Cir.1994), illustrates that requirement as well. It states, "The government, however, has chosen to prosecute not the deposits ... but the subsequent purchase..." As to Hastings, the government chose to prosecute the deposits, not subsequent transfers. The decision in Garcia-Emanuel concluded,

> Merely engaging in a transaction with money whose nature has been concealed through other means is not in itself a crime. In other words, the

> government must prove that the specific transactions in question were designed, at least in part, to launder money, not that the transactions involved money that was previously laundered through other means.

It is well established that a deposit and a subsequent purchase or transfer represent two separate transactions. Blockburger v. U.S., 52 S.Ct. 180; U.S. v. Blackman, 904 F.2d 1250 (8th Cir.1990); U.S. v. Martin, 933 F.2d 609 (8th Cir.1991); U.S. v. Rutgard, 116 F.3d 1270 (9th Cir.1997). The reversals of convictions under §1956 in U.S. v. Lovett, 964 F.2d 1029 (10th Cir.1992), and U.S. v. Sanders, 929 F.2d 1466 (10th Cir.1991), make clear that the "mere accumulation of non-concealing behavior is not enough to sustain a conviction for money laundering." Hastings' behavior in connection with the subsequent transfers is clearly non-concealing.

AS TO ESSENTIAL ELEMENT 2

The government alleges Hastings had knowledge of the scheme to defraud, and, derivatively, knowledge that the $230,000 and $750,000 checks represented the proceeds of specified unlawful activities, based on inferences drawn from (a) involvement with the 8 subsequent checks, (b) delivery of the $750,000 check, (c) signing of the $71,010.31 interest check and one of the two Feb. 14 letters, and (d) association with FNF/SD and Van Brocklin.

a) Involvement With the 8 Subsequent Checks

As previously discussed, mere awareness of Van Brocklin's possession of funds at points in time after his receipt and deposit of the $230,000 and $750,000 checks, does not satisfy the requisite knowledge element of §1956(a)(1)(B)(i), that Hastings knew Van Brocklin received a check for $230,000 deposited Feb. 21, 1992 and a check for $750,000 deposited Mar. 7, 1992, directly from FFSB's

loan closings, with a design to conceal.

b) Delivery of the $750,000 Check

The government alleges Hastings became aware of the $750,000 check prior to its deposit, based on Brekke's testimony Hastings was at FFSB on the Saturday morning Brekke delivered the envelope containing the check to Van Brocklin. Hastings' and Van Brocklin's offices were adjoining in an "L" shape. TX v.11, 1904. Brekke's testimony, however, is not definitive as to Hastings being present with Van Brocklin when Brekke delivered the envelope to Van Brocklin. In fact, Brekke said she had a hard time remembering whether Hastings was at FFSB that morning. TX v.11, 1904. Furthermore, Brekke's testimony inferred that, because it was not unusual for Hastings to work on weekends, her presence at FFSB that morning was just as likely unrelated to Van Brocklin's presence at FFSB that morning. TX v. 10, 1776; TX v. 11, 1812-13, 1902-04.

The government infers from Brekke's testimony that Hastings knew Van Brocklin received $750,000 directly from the loan closing from specified unlawful activities with a design to conceal. This critical inference, however, requires a piling of inference on inference: the inference that, assuming Hastings was present with Van Brocklin when Brekke delivered the envelope to him, that Van Brocklin opened the envelope in front of Hastings; that Van Brocklin showed Hastings the contents of the envelope; upon seeing the check from First American Title, the inference Hastings knew at that time that the closing took place at First American Title and that Hastings knew the FFSB closing was the only closing FNF/FL had going at First American Title (based on the inference Hastings had knowledge of FNF/FL's dealings and affairs); the inference Hastings would know the payee "First National Funding" was not the FL corporation (based on the

inference Hastings had knowledge of FNF/FL's dealings and affairs and the discussions and agreements with Van Brocklin); the inference Hastings knew the check was being paid to Van Brocklin; and the inference Hastings knew at that time Van Brocklin was going to deposit the $750,000 check into his business account to conceal it was being paid to him, based on the inference Hastings knew Van Brocklin had incorporated FNF/SD for the purpose of receiving and concealing the $750,000 check.

Essentially, it is inferred from Hastings' mere presence at FFSB that day that Hastings had knowledge of what had happened at the closing in California, knowledge of Van Brocklin's dealings and discussions with FNF/FL and its principals, knowledge of FNF/FL's dealings and business affairs, and knowledge of Van Brocklin's personal business affairs and future intentions. This, in spite of the fact the record shows no evidence Hastings was involved in any meetings or discussions between and among Van Brocklin, Brekke, Atterberry and Pyatt, that she was a party to any of their agreements, or that she was involved in the loans or loan sales.

This piling of unfounded inference on inference makes a mockery of the constitutional protection of presumption of innocence and the government's burden of proof beyond a reasonable doubt, and is clearly contrary to the court decisions in Direct Sales Co. v. U.S., 63 S.Ct. 1265; Ingram v. U.S., 79 S.Ct. 1314; U.S. v. Aguiar, 610 F.2d 1296 (5th Cir.1980); U.S. v. Dimeck, 24 F.3d 1239 (10th Cir.1994). Such use of inferences "...can only be based on suspicion, surmise and speculation, which is inadmissable." U.S. v. DeLutis, 722 F.2d 902 (lst Cir.1983).

c) Signing the $71,010.31 Interest Check and One of the Two Feb. 14 Letters

The government alleges Hastings knew on Friday, Feb. 14

that the Feb. 18 closing was going to be a partial sale, based on Hastings' signing of a Feb. 14 letter and interest check, and that she withheld that knowledge of a partial sale from the Board, to the detriment of FFSB. In fact, Hastings' signing of the check and this one Feb. 14 letter is the fulcrum of the government's case for Hastings' knowledge and participation in the underlying scheme to defraud and, derivatively, knowledge to satisfy essential element 2 in Counts 29 and 30.

First, however, Petitioner must point out it should not even be necessary to spend the Court's time on the matter of this one Feb. 14 letter and check, because the evidence shows a second letter dated Feb. 14, also prepared by Brekke in preparation for the Feb. 18 closing and also signed by Hastings, which clearly and completely refutes the one letter the government disingenuinely relies on. Most significantly, this second letter specifically refers to "an itemized listing of interest paid year to date (Exhibit A) for the 64 real estate loans described in said Purchase Agreement and referred to in same as Schedule A." Exh. 442. It would have been reasonable then for Hastings to have concluded that the closing scheduled for Feb. 18, in connection with which these two letters were prepared, was in fact going to include all 64 loans. It would not have been either reasonable or logical for Hastings to have concluded, based on the two letters, that only a partial sale was going to take place Feb. 18. Being uninvolved in the interest adjustment project, Hastings would not have formed the nexus claimed by the government, i.e., that an interest refund would be due on every loan in the FWMC portfolio.

Brekke testified, upon questioning by A.U.S.A. Mandel (TX v-10, 1742-43, emphasis added):

> Q: Are you familiar with the check that was issued for $71,010.31 for an interest rate adjustment?

A: Yes, I am.

Q: Can you tell us how it came to pass that was done?

A: The commercial real estate loans, when they were set up on the computer system, they were set up so that the interest rate was not changing on the correct date and the index that it changes off of was a lagging index, so that when interest rates are going down, the customer was not receiving the benefit of lower interest rates as soon as what he should have been. And we done a correction on the computer system that showed had the interest rates be [sic] done on the correct date, each customer would have received certain monies as a refund. The $71,010.31 is those refunds for a certain group of loans.

. . . . . .

A: Initially I was given a list. I don't recall how many loans that were tentative to be sold on February 18, so I based the refund amount on that list. The actual loans that sold were different from that list. . .

Q: But that list was not a list of the entire $50,000,000, was it?

A: It was for just the loans that were sold February 18, the tentative list that was sold February 18.

. . . . . .

Q: Who told you - well did you calculate the amount into the check?

A: Yes, I did.

Q: On whose instruction?

A: Darrell Van Brocklin.

Q: Who told you which loans were being sold?

A: Darrell Van Brocklin.

During cross-examination Brekke was asked about three

interest checks to FNF/FL, one of which was the $71,010.31 check (TX v.11, 1914, emphasis added):

> Q: You prepared each of the three checks that had to do with interest that was sent on to First National Funding, the Florida corporation, right?
>
> A: I did prepare those checks.
>
> Q: You presented those to Susan Hastings for her signature, is that correct?
>
> A: That's correct.
>
> Q: You were the one, then, weren't you, when you prepared those that you did the actual figuring of the amount that should go into the check?
>
> A: That's correct.

In spite of the fact the prosecutor himself asked Brekke, "...did you calculate the amount into the check?", to which Brekke responded, "Yes, I did", the prosecutor repeatedly stated in his brief to the Court of Appeals that Hastings was the one who performed the calculations and determined the figures. In spite of the fact Brekke told the prosecutor she received the instructions about the letter and check from Van Brocklin who told her which loans to include, the prosecutor attributed the performance of all those duties, and knowledge of the instructions Brekke received from Van Brocklin, to Hastings. The government has gone to alarming lengths to misrepresent Hastings' involvement with and the significance of the one Feb. 14 letter and check, as shown on page 73 of its brief to the Court of Appeals:

> In order to prepare the check for the interest rate adjustments, it was necessary to know which loans were being sold and to calculate the amount due on each of those loans. Those duties were performed by Susan Hastings several days prior to the first

> loan closing. At that time she knew that the sale was going to be for less than half of the loans approved by the board of directors at the package price. Susan Hastings facilitated this transaction by calculating the amount of interest due and by signing the check prepared by Pamela Brekke. (emphasis added)

Assuming the one Feb. 14 letter and check could infer that Hastings knew of a partial sale, that knowledge must be shown to be material in order to give rise to culpability. U.S. v. Davis, 989 F.2d 244 (7th Cir.1993); U.S. v. Swearingen, 858 F.2d 1555-58 (11th Cir.1988); U.S. v. Heath, 970 F.2d 1397, 1403 (5th Cir.1992). There is no doubt that that knowledge would have been material if it had been accompanied by knowledge the sale had been modified to allow the alleged cherry pick for which Van Brocklin would be paid bribes directly from the loan closings. That knowledge, however, is not inferable from the record. Nonetheless, on page 73 of its brief, the government asserts Hastings' alleged knowledge of a partial sale is material:

> Hastings did not notify the board that Van Brocklin was modifying this deal ... The board would not have approved a sale of the loans at the 70 cent price as evidenced by the testimony of the board members at trial.

Noticeably, the government provides no reference to any such "testimony of the board members" to support its critical assertion that "the board would not have approved" a partial sale. In fact, the government's assertion is directly contrary to the testimony and evidence provided by its own witnesses. A sampling follows:

(1) Board Chairman Samuelsen testified that, as of Feb. 26, the

Board still thought it was in the bank's best interest to sell loans at 70 cents. TX v.8, 1309.

(2) Board member Kelley testified that, with regard to selling even more loans at 70 after Feb. 18, "We wanted to sell the loans", and that it was in the best interest of FFSB to sell as many loans as possible at 70 cents. TX v.8, 1413-14, 1420.

(3) Board member Catron knew the conditions of the partial sale: "I recall being told by Mr. Van Brocklin that there was an amount that was put up kind of like option money." He also testified the Board was not there to make decisions, but to do what it was told by OTS, who exercised day-to-day control of FFSB. TX v.6, 1061-62, 1068, 1141, 1167.

(4) Board member Brown testified that, at the Feb. 20 Board meeting, "We discussed the status of the sale." TX v.10, 1610, 1642.

(5) Hawthorne testified the sale of a portion of the CA loans at 70 cents was in FFSB's interest. TX v.2, 352. He had been apprised of the partial sale when Van Brocklin called him from the Feb. 18 closing in California. TX v.2, 326-28, 339.

(6) RTC Specialist Jones testified about his investigation in May 1992 as to whether the partial sale negatively impacted the value of the unsold loans, whose value was still approximately 70 cents. TX v.5, 708-09; Exh. 496.

(7) Ron Rosenow, First Fidelity, testified 10 of the 32 FWMC loans his bank purchased became "troubled", refuting the government's claim that only the best FWMC loans were sold in the partial sale. TX v 5, 888-92.

Thus, contrary to the prosecutor's assertions to the Court of Appeals, Board members' testimony showed their decision would have been unaffected by prior knowledge of a partial sale. In fact, after being informed of the partial sale two days after it took place,

Board members raised no objections, and there was no discussion of bringing any action against FNF/FL. TX v.9, 1555-56; Exh. 79.

Interestingly, the District Court interrupted counsel's questioning of Board Chairman Samuelsen to ask counsel, ". . . is there any issue about the need to sell those loans for the amount of the sale price?" Counsel responded,

> I didn't think so, Your Honor, but the stipulation goes to the 70 cents for the whole package and there seems to be the continuing suggestion for the government that there's some kind of --- something wrong somewhere selling less than the whole package for 70 cents.

The Court responded: "I don't see it as an issue, counsel. I don't see that the government has made it an issue." TX v.8, 1308. However, the government's brief shows the matter of Hastings' inferred knowledge of a partial sale is a very big issue in the government's case against Hastings. The Court was not correct in its perception of what has turned out to be a critical government issue against Hastings.

d) Association With FNF/SD and Van Brocklin

The government also infers knowledge of the scheme to defraud, and, derivatively, requisite knowledge in Counts 29 and 30, from Hastings' association with FNF/SD and Van Brocklin. The knowledge is inferred from (i) performing tasks for Van Brocklin in his startup of FNF/SD, (ii) listing checks on deposit slips after the sale while at FFSB, (iii) knowing, after the sale, of significant collections and the 60% arrangement, and (iv) becoming an employee of FNF/SD after resigning from FFSB.

(i) Performing Tasks for Van Brocklin in His Startup of FNF/SD

The record shows Hastings filled in the blanks on the 2-

page standard state articles of incorporation form Feb. 14, went to the Rapid City Post Office to obtain a post office box for Van Brocklin Feb. 19, and went to the local office supplies store to order stationery for Van Brocklin Feb. 24. Exh. 58, 73, 233.

The record shows that at the same time Hastings was performing these tasks, Van Brocklin also had FFSB employees Brekke and Carlson performing tasks in connection with his startup of FNF/SD. TX v.11, 1853, 1893-98; v. 12, 2180, 2186; Exh. 89, 464. There was hence no exclusivity with Hastings as to awareness of Van Brocklin's new company to service the charged-off loans. Employees and Board members testified they were aware. TX v.8, 1339, 1380, 1402; v.12, 2178, 2185-86; Exh. 488.

The government's inference, because Hastings filled in the few blanks on the 2-page standard state articles of incorporation form, that she therefore knew of a scheme whereby FNF/SD was formed to conceal funds Van Brocklin was to receive from FFSB'S closings, amounts to pure speculation.

(ii) Listing Checks on Deposit Slips After the Sale While at FFSB

Brekke testified Van Brocklin instructed her how to handle payments on the charged-off loans after the sale. TX v.11, 1793-94. Payments were received by Hook's charged-off loans department, endorsed, then given to Brekke, then "to Hastings". TX v.11, 1836, 1894-95, 1898; v.12, 2075-78, 2124. All payments were thus handled by Hook and Brekke, the two employees most knowledgeable about the charged-off loans, before the checks were given "to Hastings". TX v.11, 1861-62. This would hardly suggest to Hastings impropriety consistent with a scheme to defraud. Hastings listed some of the checks on deposit slips at Van Brocklin's request. Counts 22-24 represent 3 such deposits. (The deposit slip in Count 21 was not in Hastings' handwriting; Hastings was

acquitted on Count 21.) Had Hastings typed the 3 deposit slips, or had Van Brocklin's instruction to Brekke been to give the checks "to Cappa" (Van Brocklin's secretary) rather than "to Hastings" or to anyone else for that matter, the record would show no connection whatsoever to Hastings, highlighting the mere ministerial nature of this act. U.S. v. Kington, 875 F.2d 1091, 1102 (5th Cir.1989).

U.S. v. Menesses, 962 F.2d 420 (5th Cir.1992), although a drug conspiracy case, analyzes the knowledge element and may be applied to Hastings' case. Because defendant Bratovich was present during a conversation among co-conspirators in which drugs were discussed, the government alleged he should have known the truck contained drugs. Bratovich contended he believed the truck contained furniture. The court stated.,

> Simply because a conversation may have in fact been about drugs does not mean a jury can reasonably conclude the one who may have overheard it actually knew said conversation concerned drugs. Simply because one associates with conspirators does not mean a jury can reasonably find he is a member of the conspiracy.

Menesses makes another point pertinent to Hastings'' situation. Bratovich was the driver of a Mustang FBI agents claimed was operated as a counter surveillance vehicle. The government claimed this entitled the jury to the inference of Bratovich's knowledge and participation. The court stated,

> The government has again missed the point. . .The Mustang may have been a counter surveillance vehicle, but the question is, did Bratovich know what he was surveying?. . .Juries must not be allowed to convict on mere suspicion and innuendo."

Likewise for Hastings' knowledge on Feb. 14 that Van Brocklin was forming FNF/SD. The assertion that she knew anything beyond what was known by the Board and other FFSB employees, i.e., that Van Brocklin was starting a company to service FFSB's charged-off loans, is mere unproved and unsupported allegation. The inferences were also found to fail under §2, aiding and abetting, to prove Bratovich's association with the venture, that is, that he sought by his actions to make the venture succeed. Likewise for Hastings under §2. Knowing participation in a fraudulent scheme must be proved beyond a reasonable doubt. U.S. v. Britton, 9 F.3d 708 (8th Cir.1993). The participation must be affirmative and significant. U.S. v. Brandon, 17 F.3d 409 (1st Cir.1994).

In U.S. V. Pettigrew, 77 F.3d 1500 (5th Cir.1996), the bank fraud conviction of Walker was reversed even though he acted as trustee and helped to create the sham lien. The court stated, "...a verdict may not rest on mere suspicion, speculation, or conjecture, or an overly attenuated piling of inference on inference." Similarly, in U.S. v. Ocampo, 964 F.2d 80 (1st Cir. 1992), the issue was whether defendant had the intent to conspire:

> It is a fair inference defendant knew what was going on, but that is not enough to establish intent. . . Although defendant shared the townhouse . . . there was no evidence she participated in any meetings . . . There was insufficient evidence to allow the jury to do other than impermissively speculate . . . inferences not enough to show more than mere awareness of . . . activities.

In U.S. v. Hernandez-Beltran, 867 F.2d 224 (5th Cir.1989), the court determined "defendant's mere presence around suspicious activity will not support an inference of participation . . . in the criminal activity."

(iii) Knowing, After the Sale, of Significant Collections and the 60% Arrangement

The government states in its brief on page 48 (emphasis added),

> Hastings was aware immediately after the loan closings that the sale of the charged-off loans yielded more monies to FNF/FL and FNF/SD in the first two months they were held than the sales price they sold for. Further, she was aware that Van Brocklin was retaining 60% of the proceeds after expenses. . .

This fails to show any more than that Hastings became aware of collections on the charged-off loans after the sale of the loans to FNF/FL and that Hastings became aware three months after the sale (and after becoming an employee of FNF/SD and thus privy to the information), that Van Brocklin was retaining 60% of the proceeds. TX v.11, 1789-90; Exh. 139.

The fact that timing of knowledge is critical to upholding a fraud conviction (and, derivatively, the convictions of Hastings under §1956), is revealed in U.S. v. Schuchmann, 84 F.3d 752 (5th Cir.1996), where the court upheld Schuchmann's motion for acquittal noting,

> . . . government failed to show that at time defendant approved loan, . . . defendant knew that . . . [Bentley] was mere nominee and that loan proceeds would actually be disbursed to [Sloan] . . . in violation of bank's loans-to-one-borrower limit . . . even when construed in favor of the jury verdict, this evidence does not support the inference that Schumann "knew" at the time the loan was made that it was a nominee loan.

> Instead....only permits the inference that Schuchmann knew at some point after Bentley received her loan proceeds that she had given them to Sloan. (emphasis added)

The government alleged that because the date of the loan in question coincided with the dates of five other loans made to similar investors, this proved Schuchmann knew, at the time the loan was made, it was intended for Sloan rather than Bentley. The court observed,

> . . . this coincidence does not prove that Schuchmann knew that the Bentley loan was intended for Sloan's investment . . . even when viewed in tandem with the other evidence, this similarity in timing only permits a jury to speculate about the defendant's state of mind rather than infer knowledge beyond a reasonable doubt.

Likewise, Hastings' involvement with the 8 subsequent transfers, because of their proximity in time to the FFSB closings, to infer she knew Van Brocklin received $230,000 and $750,000 directly from the closings, only permits a jury to speculate about Hastings' state of mind rather than infer knowledge beyond a reasonable doubt.

It was also alleged that Schuchmann "must have known" and "would have recognized" the loan was for someone other than loan applicant because, as bank owner, Schuchmann had financial expertise. It was also alleged Schuchmann's prior business relationships with Sloan inferred he would have known about this investment of Sloan's. The court rejected these inferences. Similarly, the government infers Hastings "would have known" about the scheme to defraud based on her being a CPA, "second only to Van Brocklin," and labeling her a "close associate" of Van Brocklin. Concluding in Schuchmann the government failed to

prove knowledge of the crimes charged, the court stated, "The evidence provides equal circumstantial support to Schuchmann's innocence, leaving open the question whether Schuchmann was Sloan's co-conspirator or his victim."

(iv) Becoming an Employee of FNF/SD After Resigning From FFSB

The government's theory is apparently that Hastings' later becoming an employee of FNF/SD infers she was a participant in the scheme to defraud, and infers she had knowledge of the value of the charged-off loans prior to the sale, in fact, that she "then well knew" (Count 1), that is, prior to the Board's approval Jan. 29, 1992, the value of the loans. There is no evidence Hastings had any knowledge of the value of the charged-off loans other than as a Board member. In fact, other Board members had more knowledge of the loans than Hastings. For example, Catron and Kelley had visited the HDA properties in Minneapolis. TX v.6, 1017; v.7, 1153; v.8, 1343, 1372, 1429; v.9, 1548-49. There was no evidence from any loan files showing any involvement in any charged-off loans, at any time, by Hastings.

There is also no evidence Hastings encouraged the Board to sell the loans or made any representations whatsoever. In fact, Catron testified she did not. TX v.7, 1202. With no evidence to the contrary, the record supports the inference Hastings made her decision to vote in the same manner as the other Board members, relying on Van Brocklin's, OTS's, and RTC's experience and expertise. TX v. 6, 1066-67; v.7, 1140; v.8, 1304-05, 1321, 1353, 1372, 1411-12, 1424-26, 1437; v.9, 1543, 1553, 1562-63, 1606-07, 1654; v. 10, 1605; Exh. 47.

AS TO ESSENTIAL ELEMENTS OF 18 U.S C. §2, AID AND ABET

Hastings' convictions under Counts 29 and 30 will also be

reviewed against the essential elements of 18 U.S.C. §2, because the Question remains, if convicted under §2, can the essential elements of aiding and abetting the two transactions charged under §1956(a)(1)(B)(i) be met by reliance on eight subsequent uncharged transactions that differ from the charged transactions in time, amount, substance and state of mind?

> In order to aid and abet another to commit a crime it is necessary (1) that a defendant in some sort associate himself with the venture, (2) that he participate in it as in something that he wishes to bring about, (3) that he seek by his action to make it succeed.

Nye & Nissen v. U.S., 69 S.Ct. 766. "Association" means defendant shared in the criminal intent of the principal. "Participation" means defendant engaged in affirmative conduct designed to aid the venture, "an act by a defendant which contributes to the execution of the criminal activity", U.S. v. Holley, 23 F.3d 902 (5th Cir.1994); U.S. v. Griffin, 84 F.3d 912 (7th Cir.1996).

In U.S. v. Tolliver, 780 F.2d 1177 (5th Cir.1986), a drug possession case, it was found the government had shown little more under §2 than presence and association. The defendant's "mere presence in the area where the narcotic is discovered or mere association with the person who does control the drug or the property where it is located" was found to be insufficient to sustain the defendant's conviction, "even on an aiding and abetting theory". U.S. v. Martiarena, 955 F.2d 363 (5th Cir.1992), demonstrated a conviction under §2 cannot be upheld unless the government has proven all essential elements of §2 for the crime charged, beyond a reasonable doubt. ". . . A general suspicion or knowledge [of illegality is] . . . not enough." U.S. v. Zambrano, 776 F.2d 1091,

1097 (2nd Cir.1985) as quoted in U.S. v. Wiley, 846 F.2d 150 (2nd Cir. 1988); U.S. v. Starr, 816 F.2d 94, 99 (2nd Cir.1987).

In Counts 29 and 30, the record shows no affirmative conduct by Hastings in the two deposit transactions with which she is charged to satisfy the participation element or to prove Hastings "sought by action to make the venture succeed", two of the three essential elements of §2. The two transactions were completed by the time Hastings filled in the eight subsequent checks. In addition, there was no evidence, pursuant to that referenced in Jury Instruction No. 32, that Hastings knew that the specified unlawful activity was being committed or was going to be committed.

> Without the knowledge, the intent cannot exist. . . Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal . . .This, because charges . . . are not to be made out by piling inference on inference.

Direct Sales Co. v. U.S., 63 S.Ct. at page 1269, as cited in Ingram v. U.S., 79 S.Ct. 1314. Failing to show intent is fatal to the "association" essential element of §2. U.S. v. Triplett, 922 F.2d 1174, 1178 (5th Cir.1991).

CONCLUSION

Allowing total reliance on uncharged transactions to impute the essential elements of the charged transactions is a violation of defendant's constitutional right to Due Process and the application of the beyond a reasonable doubt standard, setting an unconstitutional precedent for future prosecutions under §1956(a)(1)(B)(i). As stated in In re Winship, 90 S.Ct. 1068,

> Let there be no doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except

> upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. (emphasis added)

A reasonable trier of fact would have to conclude that the evidence does not meet the beyond a reasonable doubt standard on Counts 29 and 30 because the government has not met its burden of proving the four essential elements of §1956(a)(1)(B)(i) and/or the essential elements of §2, for the transactions charged. U.S. v. Behr, 33 F.3d 1033, 1035 (8th Cir.1994).

Furthermore, failing to prove requisite knowledge, beyond a reasonable doubt, in Counts 29 and 30, also results in failure of same in Count 1 under §1344 and Counts 22-28 under §1957 and §2. As can be seen, Hastings' convictions have been obtained and upheld through a piling of inference on inference, aggravated by a persistent and unchecked pattern of government misrepresentation.

For the reasons set forth, Petitioner respectfully prays that this Court issue a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeals. Alternatively, because the lower federal court decisions "have so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court", Petitioner respectfully requests that the Supreme Court exercise its power of supervision to cause a summary disposition, to "summarily reverse", the lower federal court decisions as all her convictions for failure to hold the government to its burden of proving each essential element for each crime charged, beyond a reasonable doubt. S.Ct.R.10.1(a); S.Ct.R.16.1.

Respectfully Submitted,
Susan K. Hastings,
Petitioner pro se

APPENDIX

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 96-2326

United States of America, *
Appellee, *
v. *
*
Darrell Dean Van Brocklin, *
Appellant.
* Appeals from the
No. 96-2327 * United States
* District Court for the
* District of
* South Dakota.
United States of America, *
Appellee, *
v. *
*
Travis Edward Atterberry, *
Appellant. *

No. 96-2328 *
*
United States of America, *
Appellee, *
v. *
*
Lawrence Kermit Pyatt, *
Appellant. *

Appendix 1

No. 96-2329 *

*

United States of America, *

Appellee, *

v. *

*

Susan Kay Hastings, *

Appellant. *

Submitted: February 12, 1997
Filed: June 6, 1997

Before MAGILL, BEAM, and LOKEN, Circuit Judges.

BEAM, Circuit Judge.

Defendants were convicted on various counts arising from a scheme to defraud a South Dakota bank. We affirm the convictions of all defendants. We conclude, however, that the district court erred in sentencing defendants Van Brocklin, Pyatt, and Atterberry. We also vacate the district court's forfeiture order regarding defendant Hastings, and remand for new findings regarding the restitution order and the fine imposed on defendant Hastings.

I. BACKGROUND

We summarize the facts of this case in the light most favorable to the verdicts. First Federal Savings Bank (First Federal) is a now defunct bank that had its main office in Rapid City, South Dakota. In 1989 the federal Office of Thrift Supervision (OTS) audited the bank and determined that it had a

large capital deficit and inadequate management. As a result, the bank entered into a consent agreement with OTS. Thereafter, First Federal was under the close supervision of OTS.

At the urging of OTS, First Federal hired defendant Darrell Van Brocklin as its president in 1989. By 1991, however, it became clear that the bank would have to be sold. Under the agency's direction, the bank took steps to increase its liquidity in order to be more attractive to potential buyers. One of the bank' s assets targeted for sale was a portfolio of real estate loans that it had purchased some years earlier. These loans, known as the First Western Mortgage Corporation (FWMC) loans, were secured by commercial properties, mostly in California, and had at that time an aggregate outstanding principal balance of approximately $50 million.

Defendants Travis Atterberry and Lawrence Pyatt owned First National Funding (FNF) , a Florida corporation that brokered loan sales. In 1991, FNF began negotiating with a First Federal employee about purchasing the FWMC loans. Beginning in November 1991, Van Brocklin personally continued the discussions with Atterberry and Pyatt. In December 1991, FNF offered, subject to OTS approval, to purchase the FWMC loans for a price of "81 cents," that is, 81% of the loans' aggregate principal value.

Van Brocklin sent a letter accepting the offer, but did not notify the bank's board of directors of the proposed deal. At a board meeting on December 17, Van Brocklin informed the board that some Florida buyers were interested in purchasing the loans for about 80 cents, but not that he had previously accepted FNF's 81 cent offer. The matter rested until mid-January of 1992, when Van Brocklin asked John Jones, an employee of the Resolution Trust Corporation (RTC), to evaluate the FWMC loans and give an op-

inion whether an 81 cent offer would be a good deal for the bank.[1] After reviewing the loans, Jones told Van Brocklin on January 17, 1992, that this was a good price, since the RTC would expect to charge a purchaser approximately 70 cents if it were to sell the portfolio after assuming control of the bank.

On January 21, 1992, FNF made a new offer for the entire FWMC portfolio. This time, FNF offered to purchase the loans for a price of 70 cents, or approximately $39 million. Van Brocklin related this offer to William Hawthorne, the OTS agent supervising the bank, but did not inform Hawthorne of the earlier 81 cent offer. Hawthorne approved the proposed sale at 70 cents. On January 29, 1992, the bank's board of directors voted to accept the offer.

At the same meeting, the board also approved a second deal with FNF at Van Brocklin's recommendation. This was for the sale to FNF of $8.3 million in "charged-off" loans. The charged-off loans were approximately 1,200 unrelated loans that the bank had, at various times, determined were uncollectible or inadequately collateralized, and had reduced to a zero book value and written off as assets.[2] As with the FWMC loans, OTS had been urging the bank to find a buyer for the charged-off loans. The board agreed to sell the charged-off loans to FNF for a price of approximately $167,000--2% of the loans' aggregate principal.

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[1]At that time, RTC was not supervising the bank, but was reviewing First Federal's assets in anticipation of the expected sale of the bank.

[2]Although these loans were no longer considered bank assets, at least some were still considered performing loans, in that the borrowers continued to make payments to the bank.

During the meeting, Van Brocklin also informed the board that he had received an offer of employment from FNF, and for that reason would not vote on the loan sales. Van Brocklin did not inform the board, however, that FNF was negotiating a simultaneous resale of the FWMC loans, and that he would be receiving a share of FNF's profits from that transaction. On February 12, 1992, Van Brocklin signed an employment agreement with FNF. On February 17, while the loan sales were pending, Van Brocklin and FNF entered into another agreement. This agreement provided that Van Brocklin could form a South Dakota corporation also called First National Funding (FNF-SD), which would service the charged-off loans. Under this deal, FNF-SD would retain sixty percent of collections on the loans, with the remaining profits going to FNF. On February 14, 1992, Van Brocklin incorporated FNF-SD. The same day, Van Brocklin received from FNF a check for a $50,000 "signing bonus."

Defendant Susan Hastings was a senior vice-president of the bank and a member of the board of directors. It was Hastings who prepared FNF-SD's articles of incorporation for Van Brocklin. On the same day, Hastings also sent a check (postdated to February 18) to Pyatt and Atterberry for $71,010.31. This money was to represent an interest rate adjustment for overcharges made to the FWMC loans' borrowers. Van Brocklin, however, had instructed Pam Brekke, a bank employee, to calculate the adjustment based not on the entire portfolio, but for only certain loans representing less than half the value of the $50 million portfolio. Hastings sent this partial payment even though FNF's offer had been for the entire portfolio, and the board had agreed to sell FNF all of the FWMC loans at the 70 cent price. Atterberry and Pyatt deposited this check, but never passed the funds on to the institution that ultimately purchased the FWMC loans.

Appendix 5

On February 18, 1992, Van Brocklin attended the first closing for the FWMC loan sales in California. At the closing, FNF purchased less than half of the loans. At the same closing, FNF immediately resold the loans to another loan broker for a price of 78 cents. The escrow agent conducting the closing issued a check to FNF for $1,343,138.75, representing most of its profit from the resale. The agent also issued a second check, made out to "First National Funding, Inc." for $230,000. This check went, however, to South Dakota, and was deposited in a bank account established for Van Brocklin's company FNF-SD. The same day, Hastings prepared checks, which were signed by Van Brocklin, transferring these funds to two other accounts.

On February 20, 1992, Van Brocklin reported to the bank's board that FNF had purchased some of the loans, but that closings on the rest of the portfolio were expected by the end of the month. Van Brocklin also announced that he had signed an employment contract with FNF. Neither Van Brocklin nor Hastings informed the board that Van Brocklin had already received the $50,000 "signing bonus" and $230,000 from the first closing, nor that they had incorporated FNF-SD to service the charged-off loans.

There were two more closings for the FWMC loans. In meetings on February 28 and March 2, 1992, FNF purchased three loans for 70 cents, then immediately resold them for 91.4 cents. Van Brocklin represented First Federal at the closing, although by now he had entered into an employment agreement with FNF, and had received $280,000 from FNF. From this sale, Atterberry and Pyatt received $386,059.10. On March 6, the last closing took place. Pam Brekke represented the bank at the closing. FNF bought five loans with an aggregate principal value of approximately $10 million, again at the 70 cent price, and immediately resold them for 91.4 cents.

From this sale, the escrow agent wired $1,362,142.92 to FNF in Florida. Much as in the first closing, the agent issued to "First National Funding, Inc.," an additional check for $750,000. Atterberry gave Brekke an envelope containing this check and instructed her to give it to Van Brocklin.

The next day, a Saturday with the bank closed, Brekke met Van Brocklin and Hastings at the bank and delivered the envelope to Van Brocklin. The following Monday, Hastings deposited this check in FNF-SD's account, then immediately prepared checks that transferred the money to a variety of accounts, investment funds, and to Van Brocklin's personal account. In the end, First Federal realized about $22 million from the FWMC loan sales, even though FNF had agreed to buy the entire portfolio for approximately $39 million. Pyatt's and Atterberry's profit from FNF's simultaneous resale of the loans at the three closings totaled more than $3 million. Van Brocklin received $980,000.

Meanwhile, the charged-off loans began to pay off handsomely. Three loans involved commercial properties in Minnesota known as the HDA properties, which had been in receivership. The receiver had been holding $97,000 in rental payments from the properties and seeking instruction from Van Brocklin and Brekke on how to dispose of those funds. Shortly after the sale of the charged-off loans, Van Brocklin directed Brekke to instruct the receiver to release those funds. The receiver issued a check for these funds to First Federal. Brekke instructed another bank employee to endorse the check to First National Funding, and Hastings then deposited the check in FNF-SD's account.

Furthermore, for some time prior to the loan sale, First Federal had been the plaintiff in a lawsuit involving the HDA properties. In November of 1991, Van Brocklin had taken part in settlement negotiations on behalf of the bank and had made a

settlement demand of $1 million. Van Brocklin did not, however, inform the board or OTS that a settlement was possible when the board voted to approve charging off the HDA loans in January 1992. Late in 1992, the suit settled, resulting in payments to FNF-SD totaling $700,000, which Van Brocklin split with Atterberry and Pyatt. Atterberry, Pyatt, and Van Brocklin also received substantial profits from certain other charged-off loans, most of which--including the HDA loans--were charged-off by bank employees at Van Brocklin's direction days before the sale to FNF. By the end of 1992, the charged-off loans purchased for $167,000 that same February had produced more than $1 million.

OTS began investigating these transactions in April 1992, after bank employees reported that Van Brocklin, Hastings, and Brekke were working for FNF-SD, and indeed maintaining an office for FNF-SD, while still employed by First Federal. The government issued a thirty-three count superseding indictment on April 13, 1995. The government alleged that Pyatt and Atterberry bribed Van Brocklin in order to allow them to "cherry-pick" the most desirable of the FWMC loans at the 70 cent price, rather than purchasing the entire portfolio, thus defrauding the bank. The government also alleged that part of the fraud was the addition to the charged-off loans shortly before their sale of a number of loans that Van Brocklin knew, but did not disclose, to be of substantial value. Defendants then attempted to conceal the fraud by laundering the proceeds.

Following a twenty-one day trial, Van Brocklin was convicted of one count of bank fraud (18 U.S.C. § 1344), three counts of bribery (18 U.S.C. § 215), one count of engaging in fraudulent bank transactions (18 U.S.C. § 1005), ten counts of engaging in a monetary transaction with unlawfully derived funds (18 U.S.C. § 1957), and two counts of money laundering (18 U.S.C.

§ 1956). Hastings was convicted of one count of bank fraud, seven counts of engaging in a monetary transaction with unlawfully derived funds, and two counts of money laundering. Pyatt and Atterberry were each convicted of one count of bank fraud, three counts of bribery, one count of engaging in fraudulent bank transactions, and ten counts of engaging in monetary transactions with unlawfully derived funds.[3] After a hearing, the district court entered forfeiture judgments against all defendants. Van Brocklin was sentenced to 108 months of imprisonment, a $150,000 fine, and $1,395,000 of restitution. Hastings received 51 months of imprisonment, a $10,000 fine, and a $250,000 restitution order. Pyatt and Atterberry each received 57 months of imprisonment, fines of $75,000, and $1,051,000 in restitution.

On appeal, the defendants' allegations include that the government withheld material evidence from the defense; that the district court erroneously instructed the jury; that the evidence was insufficient for conviction on various charges; and that the district court erroneously calculated their sentences.

II. DISCUSSION

A. Withholding of Material Evidence

Defendants claim that the government withheld documentary evidence material to the issue of their guilt, violating Brady v. Maryland, 373 U.S. 83 (1963). Under Brady, the

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[3]Hastings was acquitted of one count of money laundering. The district court dismissed without prejudice Count IX, which charged Van Brocklin and Atterberry of conducting a continuing financial crimes enterprise, 11 U.S.C. § 225.

government's suppression of material, exculpatory evidence violates due process. Id. at 87. To establish a Brady violation, a defendant must show that: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material. United States v. Willis, 89 F.3d 1371, 1381 (8th Cir. 1996). Evidence is "material" for Brady purposes if its cumulative effect would be to undermine confidence in the verdict. Kyles v. Whitley, 115 S. Ct. 1555, 1566 (1995). Impeachment evidence may also come within Brady. United States v. Bagley, 473 U.S. 667, 676 (1985). Prior to trial, defendants made a variety of motions seeking to compel production of certain materials, and unsuccessfully moved to dismiss the indictments for the government's alleged failures to produce evidence.

The government admits that it refused to produce one of these documents: the personnel file of William Hawthorne, the OTS agent who supervised the bank. The government maintains, however, that it withheld the file only after it had examined the file and determined that it contained no Brady material. It is the prosecutor's duty to examine documents to determine whether they contain Brady material. United States v. Pou, 953 F.2d 363, 366 (8th Cir. 1992). Despite the government's representations, defendants assert that the file may have contained impeaching information or evidence of OTS's knowledge of the events in question. Mere speculation that materials may contain exculpatory evidence is not, however, sufficient to sustain a Brady claim. United States v. Agurs, 427 U.S. 97, 109-10 (1976). Furthermore, when the government has reviewed a personnel file for Brady material, the defendant's speculation that the file may contain impeaching information does not compel the district court to review the file in camera. Pou, 953 F.2d at 367. Here, the district court's denial of the defendants' motion to compel production of

Hawthorne's file was essentially a discovery ruling, and absent a colorable showing that the file in fact contained Brady material or that the government acted in bad faith, the district court did not abuse its discretion in denying the motion. See Willis, 89 F.3d at 1381 n.6.

Other documents in dispute include an RTC asset valuation review (AVR) of the FWMC loans prepared by RTC agent Jones, various materials regarding the FWMC loans, agency investigative notes and telephone logs, correspondence, and other records. Defendants assert that these documents would have been material in impeaching government witnesses, in demonstrating that OTS and RTC were fully aware of the transactions in issue, and in demonstrating that the sale of the FWMC loans and the charged-off loans was proper. The government contends that it made available all material that was in its possession or controlled by OTS and RTC. There is evidence that at least some information the defense failed to find in the agency files did, in fact, exist at some point.[4] It is much less clear whether other requested documents, such as Van Brocklin' s correspondence and agency files on the FWMC loans, were actually retained by the agencies. The upshot is that, for much of the material sought by the defense, we face an impasse: the defendants say that exculpatory material was missing from the files it examined, while the government maintains that the defense had

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[4]For example, RTC agent Jones testified that he conducted the asset valuation review of the FWMC loans and recounted his conclusions at trial. The written report of the AVR, however, was never produced (although a summary report was). In addition, OTS agent Hawthorne testified that he made numerous call reports of his telephone contacts with First Federal, but the government produced only seven such reports.

access to everything, and that any "missing" material simply does not exist.

This discrepancy is troubling, but it does not give rise to a Brady violation. Defendants' belief that certain documents were missing from the files they examined does not, without more, establish that the government has actually suppressed those purported documents. Even for those documents that probably did exist, the record does not indicate that the absence was due to the prosecution. In determining whether a Brady violation has occurred when the government has lost or destroyed evidence, "courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." California v. Trombetta, 467 U.S. 479, 486 (1984). Here, our task is even more difficult, as we cannot be sure whether or not much of the material in dispute was ever in the government's possession.

Nevertheless, we have carefully reviewed the appellants' arguments for why the disputed material constituted Brady material. Even if we were to accept defendants' representations of the content of the material they sought, and assume that the material was in fact retained by the government, we conclude that defendants have not shown that material was either favorable to the defense or that it was material in that its collective effect would undermine confidence in the verdicts. We therefore hold that the defendants have failed to establish any of the three elements that show a Brady violation.[5]

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[5]Atterberry, Pyatt, and Hastings also argue that the government's alleged failure to produce evidence violates the Sixth Amendment's Compulsory Process Clause. See Washington v. Texas, 388 U.S. 14, 18-19 (1967). This argument is without merit. Compulsory process applies only to a defendant's right to produce witnesses and to offer witness testimony. Taylor v. Illinois, 484

B. Jury Instructions

Defendants objected to a number of the district court's jury instructions, and renew their challenges on appeal. We review the district court's formulation of the jury instructions for abuse of discretion. United States v. Kime, 99 F.3d 870, 877 (8th Cir. 1996). We uphold an instruction if it "fairly and adequately contains the law applicable to the case." United States v. Casas, 999 F.2d 1225, 1230 (8th Cir. 1993).

1. Instructions 17 and 23

All four defendants were convicted of one count of bank fraud under 18 U.S.C. § 1344. Van Brocklin, Pyatt, and Atterberry were also convicted of engaging in fraudulent bank transactions under 18 U.S.C. § 1005. Defendants assert that the district court's jury instructions on these counts impermissibly broadened the scope of the indictment, thus depriving them of their right to a grand jury indictment. See United States v. Neff, 525 F.2d 361, 363 (8th Cir. 1975). They argue that the indictment alleged only that they defrauded the directors of the bank, whereas the applicable jury instructions, 17 and 23, stated that intent to defraud could be established by showing deception of the bank's "officers, directors and examiners." Because the indictment did not mention officers or examiners, defendants argue, the jury instructions broadened the scope of the indictment.

We disagree. Sections 1005 and 1344 require proof of fraud on the bank, but such fraud can be established by misrepresentations

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U.S. 400, 407-09 (1988); Anderson v. Groose, 106 F.3d 242, 246 (8th Cir. 1997).

made to those groups delineated in the jury instructions. See United States v. Molinaro, 11 F.3d 853, 861 (9th Cir. 1993) (rejecting a similar challenge to a § 1344 conviction). Instructions 17 and 23 do not allow conviction of these defendants on crimes or facts not charged in the indictment. We therefore conclude that those instructions were not erroneous.

Furthermore, even if we were to accept the defendants' reading of the indictment, any error was harmless. The instructions required the jury to find defendants deceived the bank's "officers, directors and examiners" (emphasis added). The instructions thus required the jury to find intent to deceive the directors, which defendants allege is the sole fraud theory charged in the indictment. Indeed, by being framed in the conjunctive, Instructions 17 and 23 arguably required a greater degree of proof than either the statutes or the indictment require.

2. Instruction 25

Hastings, Pyatt, and Atterberry challenge their convictions for engaging in monetary transactions with unlawfully derived funds, pursuant to 18 U.S.C. § 1957. They claim that the applicable instruction, number 25, did not instruct the jury that conviction required proof of an effect on interstate commerce. They argue that "effect on interstate commerce" is an essential element of a § 1957 violation, and Instruction 25 allowed the jury to convict without finding such an effect.

Other circuits are split on whether "effect on interstate commerce" is an essential element of a § 1957 charge or simply a jurisdictional requirement. Compare United States v. Kelley, 929 F.2d 582, 586 (10th Cir. 1991)(holding that effect on interstate commerce is a jurisdictional requirement that need not be submitted

to the jury), with United States v. Aramony, 88 F.3d 1369,1387 (4th Cir. 1996)(holding it an essential element of the crime); see also United States v. Spriggs, 102 F.3d 1245, 1260 (D.C. Cir. 1996) (questioning Kelley). We need not enter this debate in this case. Instruction 25 required the jury to find a "monetary transaction," and then correctly defined "monetary transaction" as a transaction "in or affecting interstate or foreign commerce." Assuming the jury followed the instruction, it could not have found a monetary transaction without finding an effect on interstate commerce. Not only does Instruction 25 fairly and adequately contain the applicable law, but it tracks § 1957 nearly verbatim. The district court did not err in submitting Instruction 25 to the jury.

C. Denial of Judgment of Acquittal for Fraudulent Bank Transactions, 18 U.S.C. § 1005

Count VIII of the indictment charged Van Brocklin, Atterberry, and Pyatt with violating the fourth paragraph of 18 U.S.C. § 1005, which provides:

> Whoever with intent to defraud the United States or any agency thereof, or any financial institution referred to in this section, participates or shares in or receives (directly or indirectly) any money, profit, property, or benefits, through any transaction, loan, commission, contract, or any other act of any such financial institution --
>
> Shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Pyatt and Atterberry moved for a judgment of acquittal on Count

VIII, arguing that § 1005 applies only to bank officers, directors, agents, or employees. The district court denied the motion.

The first four paragraphs of § 1005 define four categories of fraudulent conduct that the statute criminalizes. The first paragraph states that "[w]hoever, being an officer, director, agent or employee of any [bank] without authority . . . issues or puts in circulation any notes of such bank" is liable. (emphasis added). The following three paragraphs (including paragraph four, under which defendants were charged) contain no such class restriction.

Pyatt and Atterberry argue that, despite the lack of a class restriction in the text of paragraph four, Congress' intent was to limit liability under § 1005 to bank insiders. Pyatt relies on United States v. Edwards, 566 F. Supp. 1219, 1221 (D. Conn. 1983), in which the court held that paragraph three, which also contains no class restriction, applies only to officers,directors, employees, and agents. In a case not cited by the parties, the Third Circuit reached a similar conclusion about paragraph three. United States v. Barel, 939 F.2d 26, 38-41 (3d Cir. 1991). The courts in Edward and Barel reasoned that the predecessor statute to § 1005 limited criminal liability to bank insiders, and the legislative history suggested that Congress intended no substantive changes when it amended and recodified the statute in 1948. Barel, 939 F.2d at 40-41; Edwards, 566 F. Supp. at 1220-21; but cf. United States v. Edick, 432 F.2d 350, 352-353 (4th Cir.1970) (affirming conviction of non-insider because plain language of paragraph three contains no class restriction).

We need not decide whether the courts in Edwards and Barel correctly interpreted Congress' intent with regard to paragraph three, because paragraph four has a much different history than the rest of §1005. Congress added paragraph four to the statute in 1989 as part of the Financial Institutions Reform, Recovery, and

Enforcement Act (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, 499, § 961(d)(3) (1989). A response to the savings and loan disaster of the 1980s, FIRREA was intended, in part, "[t]o strengthen the enforcement powers of Federal regulators of depository institutions [and to] strengthen the civil, sanctions and criminal penalties for defrauding or otherwise damaging depository institutions and their depositors." Id. at § 101 (9) - (10). FIRREA's legislative history notes the addition of paragraph four, but in no way indicates that liability under that provision is limited to bank insiders. See H.R. Rep. No. 101-54(1), at 399-400, 472-73, reprinted in 1989 U.S.C.C.A. N. 195-96, 268-69. The legislative history of the other provisions of § 1005 upon which Edwards and Barel relied is simply not applicable to paragraph four.

Paragraph four is not by its terms restricted to bank insiders. Furthermore, the conduct that the paragraph criminalizes--participation in or receipt of funds derived from a bank transaction with the intent to defraud--clearly encompasses the kinds of acts charged in this case. Nor is the described conduct the sort that, in most cases, would require insider status or access to bank records. Given Congress' concerns in enacting FIRREA, we decline to read into paragraph four of § 1005 a class restriction that Congress did not itself mention. We hold that when a person "with intent to defraud . . . participates or shares in or receives" funds derived from a transaction with the bank, that person may be convicted under paragraph four of § 1005, regardless of whether he or she is a bank employee, officer, director, or agent.

D. Sufficiency of the Evidence

Defendants challenge the sufficiency of the evidence to convict them on a number of charges. Our review of the sufficiency

of evidence is narrow, viewing all evidence in the light most favorable to the verdict and affording the government the benefit of all reasonable inferences that can be drawn from the evidence. United States v. Smith, 104 F.3d 145, 147 (8th Cir. 1997). We must affirm if any interpretation of the evidence would allow a reasonable-minded jury to find the defendants guilty beyond a reasonable doubt. Id.

1. Fraudulent Bank Transactions

Pyatt and Atterberry challenge the evidence supporting their convictions for engaging in fraudulent bank transactions, in violation of 18 U.S.C. § 1005. A defendant violates § 1005 if he or she "with intent to defraud . . . . participates or shares in or receives (directly or indirectly) any money . . . through any transaction" with a financial institution. The evidence showed that Pyatt and Atterberry received more than $3 million in profit from the FWMC loan sales and a sizable share of the proceeds from FNF-SD's collections on the charged-off loans. Van Brocklin received nearly $1 million in payments from these sales, and allowed FNF to purchase a portion of the FWMC portfolio when it was committed to buying the entire package, enabling FNF to resell those loans at a substantial profit. A reasonable jury could conclude that the defendants received money from the loan sales as part of an intent to defraud the bank, and we affirm these convictions.

2. Bank Fraud

Hastings, Pyatt, and Atterberry challenge their convictions for bank fraud, 18 U.S.C. § 1344. To prove a violation of § 1344, the government must show that defendants "knowingly executed a

scheme to defraud a federally insured bank." United States v. Britton, 9 F.3d 708, 709 (8th Cir. 1993). Defendants argue that the evidence was insufficient to establish their knowing participation in fraud. Pyatt and Atterberry further argue that FNF's dealings with First Federal merely reflect bona fide transactions and "aggressive brokering."

The evidence showed that Pyatt and Atterberry covertly paid Van Brocklin more than a million dollars in three separate payments. Pyatt and Atterberry then purchased less than half of the FWMC loans though they were obligated to purchase the entire portfolio, and then made immediate and substantial profits by reselling the loans. Hastings, who was a high ranking bank officer, board member, and who worked closely with Van Brocklin, was aware of these payments. She assisted in transferring the proceeds, sent FNF a check for over $71,000 that went directly to Pyatt and Atterberry, and did not disclose these dealings to the board or OTS. Hastings was aware of the substantial profits from the charged-off loans, which Van Brocklin shared with Pyatt and Atterberry, assisted in processing those funds, and did this even while continuing to work for First Federal. A reasonable jury could have inferred that the defendants knowingly engaged in a scheme to defraud the bank, and we affirm the convictions.

3. Bank Bribery

Pyatt and Atterberry challenge their convictions, under Counts II, III, and IV, for bank bribery, 18 U.S.C. § 215.[6] The

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[6]Section 215 imposes criminal liability on whomever:

(1) corruptly gives, offers, or promises anything of value to

basis of these charges was the $50,000 "signing bonus" to Van Brocklin and the two payments of $230,000 and $750,000 from the FWMC loan closings. Defendants contend that the government failed to prove that the payments to Van Brocklin were anything other than bona fide compensation pursuant to his employment agreement with FNF. The evidence showed that Pyatt and Atterberry negotiated the loan transactions with Van Brocklin, and that their offer for the FWMC loans dropped from 81 cents to 70 cents after RTC agent Jones told Van Brocklin 70 cents was a fair price. Van Brocklin failed to inform either the bank directors or OTS of the 81 cent offer. Van Brocklin did not disclose the payments from FNF. The two checks to Van Brocklin from the FWMC loan proceeds were made out to "First National Funding, Inc." rather than to him, which the government argued indicated an attempt to conceal those payments. Van Brocklin allowed FNF to buy only a portion of the FWMC portfolio, and Pyatt and Atterberry obtained quick and sizeable profits from the transactions, which they shared with Van Brocklin. This evidence would allow a

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> any person, with intent to influence or reward an officer, director, employee, agent, or attorney of a financial institution in connection with any business or transaction of such institution; or
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> (2) as an officer, director, employee, agent, or attorney of a financial institution, corruptly solicits or demands for the benefit of any person, or corruptly accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business or transaction of such institution.

18 U.S.C. § 215 (a) (1) & (2). The statute thus criminalizes both making and receiving a bribe in connection with a bank transaction.

reasonable jury to agree with the government's theory that Pyatt and Atterberry paid Van Brocklin in exchange for allowing them to cherry-pick the FWMC loans. The convictions are affirmed.

4. Money Laundering/Monetary Transactions With Unlawfully Derived Funds

All four defendants challenge their convictions, on multiple counts, of money laundering, 18 U.S.C. § 1956, and engaging in monetary transactions with unlawfully derived funds, 18 U.S.C. § 1957. The elements of a § 1956 violation are: (1) the defendant conducted a financial transaction which involved the proceeds of unlawful activity; (2) defendant knew that the property involved in the transaction was the proceeds of specified unlawful activity; and (3) that defendant intended to promote the carrying on of specified unlawful activity. United States v. Williams, 87 F.3d 249, 254-55 (8th Cir. 1996). A conviction under § 1957 requires a showing that: (1) defendant knowingly engaged in a monetary transaction; (2) the defendant knew that the property involved derived from specified unlawful activity; and (3) the property is of a value greater than $10,000. See United States v. Hare, 49 F.3d 447, 451 (8th Cir 1995).

The § 1957 counts involved a number of deposits, payments, and transfers of the proceeds of the charged-off loans after the sale to FNF, the profits on the resale of the FWMC loans, and the $71,010.31 "interest adjustment" sent to FNF for the FWMC loans. Hastings's and Van Brocklin's § 1956 money laundering convictions stemmed from their deposit and immediate transfer of the two checks totaling $980,000 that Van Brocklin received from the FWMC loan sales, and which were the basis of the bribery convictions. In light of the evidence already

summarized, the jury could reasonably have found that these transactions met the elements set forth above.

As noted previously, defendants contend that an effect on interstate commerce is an essential element of these crimes, rather than simply a jurisdictional requirement. If we assume, without deciding, that such an effect is an element of these crimes, there was nonetheless ample evidence to support these convictions. The smallest of these transactions involved $14,000 and the largest $1,362,142.92. Defendants' conduct involved a number of banks and individuals in three different states. A reasonable jury could find that each of these transactions had an effect on interstate commerce.[7]

Finally, Defendants challenge the forfeiture judgments entered against them, on the basis that there was insufficient evidence for conviction on the predicate crimes. Because we find the evidence sufficient for all of the convictions, we affirm the forfeiture judgments, except as otherwise discussed below.

E. Sentencing Issues

1. Enhancement for Loss

Van Brocklin, Atterberry, and Pyatt were sentenced under the sentencing guideline applicable to bank fraud. U.S. Sentencing

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[7]Hastings and Pyatt also argue that conviction required that the government prove that the transactions involved "financial institutions," which they claim is an essential element of these crimes. Even if we were to agree with this premise, we find that the evidence clearly supported an affirmative jury finding in this regard.

Guidelines Manual § 2F1.1. The district court found that defendants' conduct caused a loss to First Federal of $3.892 million, resulting in a thirteen-level specific offense characteristic enhancement under § 2F1.1 (b) (1) (N). In determining the total loss, the district court considered the following sums: (1) the $980,000 that Van Brocklin received in bribe money from Atterberry and Pyatt; (2) FNF's profits from the FWMC loan sales; (3) the $97,000 released by the HDA property receiver; and (4) the settlement from the HDA litigation. Defendants claim that the district court erroneously equated the bank's loss with the profit made by the defendants. We review the district court's interpretation of the Guidelines de novo, and the factual findings supporting its conclusions for clear error. United States v. Willis, 997 F.2d 407, 417 (8th Cir. 1993).

A number of courts have held that, in some cases, it is inappropriate to determine loss under § 2F1.1 in accordance with the gain to the defendants. See United States v. Kopp, 951 F.2d 521, 526-36 (3d Cir. 1991) (summarizing cases). The guideline's application notes are ambiguous as to whether or when such a method is appropriate, stating that "loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information. . . . The offender's gain from committing the fraud is an alternative estimate that ordinarily will overestimate the loss." U.S.S.G. § 2F1.1, comment. (n.8).

Given the wide latitude the guideline gives sentencing courts in determining loss, we are not prepared to say that determining loss according to a defendant's profit is necessarily erroneous, so long as the evidence indicates that such a method

provides a reasonable estimate of the actual loss.[8] We find that in this case, however, the district court clearly erred in equating "loss" solely with the defendants' profit. The district court apparently found that the entire profit that FNF made from its resale of the FWMC loans was money that should have gone to First Federal, and was therefore "loss" to the bank. The court also concluded that the $980,000 that Van Brocklin received from the FWMC sales, which was paid out of FNF's profit margin from those sales, also should have gone to the bank and was thus "loss."

The problem with this is that the government never established by a preponderance of the evidence what FNF would have or should have paid for those loans had the sales been legitimate. In this case, both the bank directors and OTS wanted those loans sold. Any loss to the bank from defendants' scheme did not occur simply because the loans were sold, but only if the loans were sold at an artificially low price. This was the very nature of the government's cherry-picking theory: that FNF selectively purchased high-value loans from the FWMC portfolio, yet paid a 70 cent price that was based on the quality of the portfolio as a whole.

The government has the burden of proof in showing loss under § 2F1.1, and the evidence at trial and at sentencing simply did not establish with any certainty what that loss was. Even if we were to assume that FNF, acting without fraud and bribery, would have paid a higher price to First Federal for the loans it

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[8]In several of the cases summarized in Kopp, for example, the defendant had fraudulently obtained a loan, but then fully performed according to the terms of the loan. In those cases, the amount of the loan would have greatly overestimated any actual loss to the bank. Kopp, 951 F.2d at 531-33. Those defendants' gains were thus not a reasonable estimate of actual loss.

cherrypicked, FNF presumably would still have resold those loans at a yet higher price in order to turn a profit. Similarly, using the bribes paid to Van Brocklin as a proxy for loss is inappropriate, since those funds also came out of FNF's profit margin from the sales. The evidence did not establish what First Federal should have received on those sales in a completely legitimate transaction. Equating defendants' entire profit with "loss" to First Federal in all likelihood overestimates the actual loss to the bank.[9] We therefore hold that the district court clearly erred in its determination of the bank's loss under § 2F1.1. We remand to the district court for a new determination of loss to the bank under § 2F1.1 or for recalculation of the sentences under another appropriate guideline.

2. Denial of Reduction for Mitigating Role for Hastings

Hastings's presentence report recommended that she receive a four-level reduction in her offense level as a "minimal participant" pursuant to U.S.S.G. § 3B1.2(a). Hastings alternatively argued that she is entitled to at least a two-level reduction under § 3B1.2(b) as a "minor participant." The district court declined to apply either reduction. We review the district court's determination of § 3B1.2 adjustments for clear error. United States v. Field, 110 F.3d 587, 590 (8th Cir. 1997).

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[9]Establishing loss is even more complicated in this case, because the government stipulated that 70 cents was a fair price for the FWMC loan portfolio. Furthermore, the evidence that might most clearly establish the actual loss to the bank, the asset valuation review conducted by RTC agent John Jones, was one of the documents that defendants allege the government failed to produce.

A four-level reduction under § 3B1.2(a) is appropriate for defendants "who are plainly among the least culpable of those involved in the conduct of a group." U.S.S.G. § 3B1.2, comment. (n. 1). It is meant to be "used infrequently" and is "appropriate, for example, for someone who played no other role in a very large drug smuggling operation than to offload part of a single marihuana shipment, or in a case where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs." Id. (n. 2). Hastings's conduct in this case is not comparable to the infrequent situations contemplated by the guideline. Hastings was a high-ranking bank officer and a member of the board, knew of the scheme, and concealed Van Brocklin's conduct from the board and OTS. Hastings was present when Van Brocklin received $750,000 in bribe money and personally participated in transferring the funds that were the subject of her money laundering convictions. The court's denial of a four-level adjustment was not clearly erroneous.

Whether Hastings should have at least received a two-level reduction as a minor participant is a closer question. "For purposes of §3B1.2(b), a minor participant means any participant who is less culpable than most other participants, but whose role could not be described as minimal." U.S.S.G. § 3B1.2, comment. (n.3). Hastings did not receive any direct share of the proceeds of the loan sales, and it is clear that Van Brocklin, Atterberry, and Pyatt were the masterminds of the deal. Given the facts described previously, however, we cannot conclude that the district court clearly erred in denying a two-level reduction.[10]

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[10]We note that although the district court denied a reduction under § 3B1.2., the court did, in fact, reduce Hastings's total offense level from 26 to 24 "in the interest of proportionality." Sentencing

Hastings also appeals the district court's denial of her motion for a downward departure. The record shows that the district court recognized that it had authority to depart downward, but refused to exercise its discretion to do so. Sentencing Tr. at 167. Such a discretionary refusal to grant a downward departure is not reviewable. United States v. McCarthy, 97 F.3d 1562, 1578 (8th Cir. 1996).

3. Hastings's Forfeiture, Restitution, and Fine

The district court entered a forfeiture judgment against Hastings for $1,325,910.60. Hastings argues that this forfeiture order violates the Excessive Fines Clause of the Eighth Amendment, and we agree.

Criminal forfeitures are monetary punishments subject to the Eighth Amendment's Excessive Fines Clause. Alexander v. United States, 509 U.S. 544, 558-59 (1993). Whether a forfeiture is "grossly disproportionate" and thus violates the Eighth Amendment is a fact-sensitive inquiry that depends on a number of factors. United States v. Alexander, 32 F.3d 1231, 1236 (8th Cir. 1994). These factors include, but are not limited to: the seriousness of the offense; an assessment of the personal benefit reaped by the particular defendant; the defendant's motive and culpability; and

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Tr. at 167-68. The government did not appeal this reduction, which the district court recognized could not "be classified as a departure." Id. at 167. The district court was, in part, concerned that Hastings's calculated total offense level of 26 would be higher than that of Atterberry and Pyatt, and that this was unfair in light of Hastings's role in the crimes. Id. at 166-68. The district court appears to have, in effect, given Hastings the benefit of a § 3B.1.2 adjustment by another name.

"the extent that the defendant's interest and the enterprise itself are tainted by criminal conduct." Id. at 1236-37 (quoting United States v. Sarbello, 985 F.2d 716, 724 (3d Cir. 1993)).

While Hastings's convictions for money laundering and bank fraud constitute serious offenses, the facts of this case indicate that a $1.3 million forfeiture order is grossly disproportionate. Although Hastings abused her position of trust as a high-ranking bank official, she was clearly a secondary figure in the crimes. Furthermore, her motive appears to have been a misguided loyalty to Van Brocklin, rather than a direct interest in the success of the scheme. As the district court noted at sentencing, "Ms. Hastings' situation provides special difficulty for the Court in [that] much of her conduct was pressed upon her by Mr. Van Brocklin." Sentencing Tr. 164.[11] Hastings reaped little benefit: while the scheme earned Van Brocklin, Atterberry, and Pyatt millions of dollars, Hastings received no direct share of the proceeds.[12]

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[11]Even the prosecutor noted at sentencing that "It is really a difficult balance . . . regarding this defendant. [B]ut for her association with Van Brocklin, I don't believe she'd be sitting in the courtroom today. . . . So was it out of loyalty to Van Brocklin? Was it manipulation on his part?" Sentencing Tr. 195-96.

[12]We thus reject the government's argument that an excessive fines analysis is inappropriate because Hastings's forfeiture order seeks to recover proceeds of the crime. See Alexander, 32 F.3d at 1236 ("Forfeiture of proceeds [is not] subject to the excessive fines clause, as it simply parts the owner from the fruits of the criminal activity."). Simply put, Hastings received none of the fruits of the illegal activity. Hastings's forfeiture judgment is thus punitive, not remedial, and subject to the Excessive Fines Clause.

Despite this, Hastings's forfeiture judgment is only marginally less than Van Brocklin's.[13] In view of these facts, we hold that the forfeiture judgment against Hastings was an excessive fine.

The district court also entered a $250,000 restitution order against Hastings. In light of the facts described above, we are troubled that this steep restitution order may also be disproportionate. In any event, sentencing courts are to consider a number of factors in determining whether to order restitution, see 18 U.S.C. § 3664 (a) , and should in most cases make specific findings of fact in regard to these factors. Kok v. United States, 17 F.3d 247, 251 (8th Cir. 1994). In this case, the district court made no findings that show it considered these factors, including whether Hastings has the ability to pay restitution. A failure to make such a finding before ordering restitution is an abuse of discretion. United States v. Mitchell, 893 F.2d 935, 936 (8th Cir. 1990). Similarly, the district court did not make required findings of fact showing that it considered the relevant Guideline factors, including ability to pay, in imposing a $10,000 fine against Hastings. See U.S.S.G. § 5E1.2. Such findings are mandatory. United States v. Miller, 995 F.2d 865, 869 (8th Cir. 1993); United States v. Walker, 900 F.2d 1201, 1205-06 (8th Cir. 1990). We therefore vacate Hastings' s restitution order and fine, subject to new determinations by the district court based on the required findings.

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[13]The district court ordered Hastings to forfeit $1,325,910.60; Van Brocklin, $1,395,323.51.

F. Other Claims

We have considered defendants' remaining arguments, including challenges to various trial rulings by the district court and Hastings's contention of prosecutorial misconduct. We find these issues to be without merit.

III. CONCLUSION

The convictions of all defendants are affirmed. We remand to the district court for resentencing of defendants Van Brocklin, Atterberry, and Pyatt. We vacate the forfeiture judgment, restitution order, and fine imposed on defendant Hastings, and remand for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-2326/2327/2328/2329SDRC

United States of America,	)	
Appellee,	)	Appeal from the United
v.	)	States District Court
	)	District of South Dakota
Darrell Dean Van Brocklin, et al.,)		
Appellants.	)	

After consideration of the court the various joinder motions of the appellants with regard to the petitions for rehearing are granted. The petitions for rehearing filed by Van Brocklin, Hastings and Pyatt are denied.

August 13, 1997

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals Eighth Circuit

AUTHORITIES INVOLVED
WITH PERTINENT TEXT SET OUT VERBATIM

Constitutional Provisions

U. S. Const. amend. V:

"No person shall . . . be deprived of life, liberty, or property, without due process of law..."

Statutes

18 U.S.C. §2:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him (her) or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. §215:

a) Whoever - (1) corruptly gives, offers or promises anything of value to any person, with intent to influence or reward an officer, director, employee, agent or attorney of a financial institution in connection with any business or transaction of such institution; shall be fined not more than $1,000,000.00 or imprisonment not more than 30 years, or both. . .

18 U.S.C. §1344:

Whoever knowingly executes, or attempts to execute, a scheme or artifice --

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be [guilty of an offense against the United States].

18 U.S.C. §1956(a)(1)(B)(i):

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity ---

(B) knowing that the transaction is designed in whole or in part ---

(i)to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity;

shall be [guilty of an offense against the United States].

18 U.S.C. §1957:

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity,

shall be [guilty of an offense against the United States].

(d) The circumstances referred to in subsection (a) are --

(1)that the offense under this section takes place in the United States. . .

28 U.S.C. §1254(1):

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

Rules

S.Ct.R.10.1(a) :

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers: (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; . . . or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; . . .

S.Ct.R.16.1:

After considering the documents distributed under Rule 15, the Court will enter an appropriate order. The order may be a summary disposition on the merits.